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SUPREME COURT, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1958

No. 768

ROBERT F. MINNEY,

Appellant,

vs.

CITY OF AZUSA, a Municipal Corporation,

Appellee.

APPEAL FROM THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

STATEMENT AS TO JURISDICTION

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INDEX

Subject Index

	PAGE
Statement as to jurisdiction	1
Opinion	1
Jurisdiction	2
Ordinance involved	3
Constitutional provisions invoked	5
Questions presented	6
Statement of the case	7
Nature of action	7
Summary of the material facts	8
How federal questions raised and determined	13
All questions raised are substantial	13
I. Exclusion of churches while allowing other public buildings	13
II. Exclusion of the churches from over ninety percent of city	16
III. Ordinance grants unlimited discretion to City Council	19
IV. Discrimination between appellant and other religions	20
V. Court erred in resting decision on presumption of constitutionality of Ordinance and City Council action	22
VI. Reasons of City Council insufficient to deny right guaranteed by First Amendment	23
Conclusion	26
Appendix A (Judgment of District Court of Appeal)	27
Appendix B (Order of Supreme Court of California denying hearing)	28
Opinion of District Court of Appeal	*Bound separately*

Cases Cited

PAGE

American Railway Express Co. v. Levee
263 U. S. 19 (1923) 2
American Communications Association v. Douds
339 U. S. 382 (1950) 25, 26
Ashcroft v. Tennessee
322 U. S. 143 18
Busey v. District of Columbia
138 F. 2d 592 (D.C. Cir. 1943) 22, 23
Cantwell v. Connecticut
310 U. S. 296 (1940) 20, 24
Congregation Temple Israel v. City of Creve Coeur
— S. W. 2d — (S.Ct. Mo. Jan. 12, 1959, No. 46,597) 19
Corporation of Presiding Bishop v. City of Porterville
90 Cal. App. 2d 656, 203 P. 2d 823 (1949); 338 U. S. 805 ..... 15, 16, 25, 26
Craig v. Harvey
331 U. S. 367 ..... 18, 21
Danskin v. San Diego Unified School District
28 Cal. 2d 536, 171 P. 2d 885 (1946) 20
Fiske v. Kansas
274 U. S. 380 18
Follett v. Town of McCormick
321 U. S. 573 (1944) 24
Fowler v. Rhode Island
345 U. S. 67 (1953) 14, 20
Jamison v. Texas
318 U. S. 413 (1943) 3
Largent v. Texas
318 U. S. 418 (1943) 3, 20, 24
Lovell v. City of Griffin
303 U. S. 444 (1938) 20, 24
Mares, In re
75 Cal. App. 2d 798, 806, 171 P. 2d 762 (1946) .. 22, 24

PAGE

Martin v. City of Struthers
319 U. S. 141 (1943) 24
Michigan-Wisconsin Pipe Line Co. v. Calvert
347 U. S. 157 (1954) 2
Minney v. City of Azusa
164 A. C. A. 16, 330 P. 2d 255 (Oct. 3, 1958) 1
Mooney v. Village of Orchard Lake
333 Mich. 389, 53 N. W. 2d 308 (1952) 19, 25
Murdock v. Pennsylvania
319 U. S. 105 (1943) 24
Niemotko v. Maryland
340 U. S. 268 (1951) 14
Norris v. Alabama
294 U. S. 587 18
Pittsford v. City of Los Angeles
50 Cal. App. 2d 25, 122 P. 2d 535 (1942) 22, 24
Porterfield, In re
28 Cal. 2d 91, 168 P. 2d 706 (1946) 21, 23
Roman Catholic etc. Corp. v. City of Piedmont
45 Cal. 2d 325, 289 P. 2d 438 (1955) 15, 22, 23, 25
Saia v. New York
334 U. S. 558 (1948) 20, 24
Schneider v. New Jersey
308 U. S. 147 (1939) 24, 26
Skinner v. Oklahoma
316 U. S. 535 (1942) 14, 20
Stratton v. Stratton
239 U. S. 55 (1915) 2
State ex rel. Synod of Ohio v. Joseph
139 Ohio St. 229, 39 N. E. 2d 515 (1942) 22, 23
Terminiello v. City of Chicago
337 U. S. 1 (1949) 23
Thomas v. Collins
323 U. S. 516 (1945) 22, 23, 24

Cases Cited *continued*

	PAGE
Thornhill v. Alabama 310 U. S. 88 (1940)	24
Trustees of First M. E. Church South v. Atlanta 76 Ga. 181 (1886)	14
Underhill v. Board of Appeals of Town of Oyster Bay 273 App. Div. 788, 75 N.Y.S. 2d 327; 297 N.Y. 937, 80 N. E. 2d 342 (1947)	20
United States v. Carolene Products Co. 304 U. S. 144 (1938)	22, 23
West Virginia State Board of Education v. Barnette 319 U. S. 624 (1943)	24
Yick Wo v. Hopkins 118 U. S. 356 (1886)	14, 20

Statutes Cited

California Rules on Appeal, Rule 29 (b)	18
Ordinance No. 409 of the City of Azusa	3, 4, 5, 7, 9, 13, 14
Ordinance No. 441 of the City of Azusa	4, 5
Ordinance No. 455 of the City of Azusa	4, 14, 16, 19
28 U. S. C. § 1257 (2)	2
United States Constitution	
Amendment I	5, 6, 7, 13, 20, 23
Amendment XIV	6, 7, 13, 20, 23

Other Authorities Cited

23 Brooklyn L. Rev. 185	25
44 Cal. L. Rev. 775, 777	25
70 Harv. L. Rev. 1428	25
55 Mich. L. Rev. 601, 602	25
27 St. Johns L. Rev. 93 (1952)	25
3 St. Louis U. L. Jour. 265	25
3 U.C.L.A. L. Rev. 387, 389, 390, 391	22, 23, 25
53 W. Va. L. Rev. 301	25

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OCTOBER TERM, 1958

No.

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Appellant,

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CITY OF AZUSA, a Municipal Corporation,

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APPEAL FROM THE DISTRICT COURT OF APPEAL,
STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

STATEMENT AS TO JURISDICTION

This is an appeal from the judgment of the District Court of Appeal of the State of California, Second Appellate District, dated October 3, 1958, which holds constitutional a Zoning Ordinance prohibiting churches within over 95 per cent of the City by exclusion from certain residential areas. This jurisdictional statement is submitted to show that this Court has jurisdiction of this appeal and that the questions presented are substantial.

OPINION

The opinion of the District Court of Appeal is reported. (*Minney* v. *City of Azusa,* 164 A. C. A. 16, 330 P. 2d 255

(Oct. 3, 1958)) [Op. 1-29][1] It is printed separately and accompanies this statement. It is marked: "Opinion of District Court of Appeal Accompanying Jurisdictional Statement."

JURISDICTION

This case involves a petition for writ of mandate and for other relief filed in the Superior Court of Los Angeles County. It concerns the invalidity of a Zoning Ordinance of the City of Azusa and the action of the City Council, taken under the Ordinance, denying a permit to build a church in the R-1 district, which is not exclusively residential but has in it many other public and non-residential uses, in addition to single homes. The judgment of the Superior Court of Los Angeles County denying all relief prayed for by appellant through dismissal of the amended petition on demurrer was affirmed by the District Court of Appeal on October 3, 1958. [Tr. 110, 156][2] The judgment is Appendix A to this statement, *infra*, at page 27. A petition for hearing was duly filed in the Supreme Court of California. [Tr. 110, 157] It was denied on December 1, 1958, by the Supreme Court of California. [Tr. 110, 242] The order denying hearing is Appendix B to this statement, *infra*, at page 28. The judgment of the District Court of Appeal became final on December 1, 1958. The notice of appeal to this Court was timely filed in the District Court of Appeal on February 24, 1958. (*American Railway Express Co.* v. *Levee*, 263 U. S. 19, 20-21 (1923)) Jurisdiction of this Court to hear and to decide this appeal is granted by 28 U. S. C. §1257 (2).--*Stratton* v. *Stratton*, 239 U. S. 55 (1915); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347

[1] Figures appearing herein within brackets preceded by "Op." refer to pages of the separately bound appendix to this petition for hearing wherein the opinion of the District Court of Appeal, annexed to this petition by reference, is printed in full.

[2] Figures appearing herein within brackets preceded by "Tr." refer to pages of the transcript of the record prepared by the Clerk of the District Court of Appeal and filed in the office of the Clerk of this Court.

U. S. 157, 160 (1954); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Jamison* v. *Texas*, 318 U. S. 413 (1943).

ORDINANCE INVOLVED

The proceedings in the Planning Commission and the City Council of the City of Azusa were had by appellant under the variance provisions of the original Zoning Ordinance of Azusa, known as Ordinance 409. The pertinent parts of this Ordinance were pleaded word for word in the amended petition, which is contained in the transcript. [Tr. 25-29] The green-covered appendix to appellant's opening brief in the District Court of Appeal, which has been filed in this Court and accompanies this statement, also shows those parts of the Ordinance. [App. 408][3]

The application for variance must be in writing and addressed to the Planning Commission, according to Section 19.3 of Article XIX, Ordinance No. 409. [Tr. 58; App. 5] The information to be put in the application is specified in Section 19.4 of Article XIX. [Tr. 58-59; App. 5-6] Provision is made for investigation followed by a hearing upon actual notice to certain property owners and notice by publication. [Tr. 59-60; App. 6-7] Provision for the recommendation by the Planning Commission to the City Council to either grant or deny a variance is provided for in Section 19-7 of Article XIX. [Tr. 60; App. 7-8] The City Council may either affirm the action of the Planning Commission or reverse or modify the Planning Commission, according to Section 19.8. [Tr. 60-61; App. 7-8]

Section 3.2 of an amendment to Ordinance No. 409, known as Ordinance No. 455, provides, among other things, as follows:

[3] Figures appearing herein preceded by "App." refer to pages of the green-backed printed appendix to the brief filed by appellant in the District Court of Appeal which contains all pertinent and material exhibits attached to the second amended petition for writ of mandate and other relief. Nine copies of this green-covered appendix have been filed with the Clerk of this Court for the use of the Justices.

> The boundaries of such zones are shown upon the Zoning Map adopted by this ordinance, or amendments hereto, and are hereby adopted and approved . . .

Originally the Ordinance provided for churches in the R-3 zone, according to Section 7.1 of Ordinance 441, amending Ordinance No. 409. [Tr. 61; App. 8] Ordinance No. 455 amending Ordinance No. 409 later specifically prohibited churches in the R-1 zone. [Tr. 62-63; App. 10-11] Uses permitted in the R-1 zone are stipulated in Section 5.1 of Ordinance No. 455, amending Ordinance No. 409. Section 5.1 reads as follows:

> Section 5.1. Uses Permitted.
>
> (a) A one-family dwelling of a permanent character, placed in a permanent location and used by but one family;
>
> (b) Agriculture and horticulture, flower and vegetable gardening, nurseries and greenhouses used only for purposes of propagation and culture and not including any sale at retail from the premises nor any signs or displays;
>
> (c) Accessory building, provided there is a main building on the premises:
>
> (1) Private recreational facilities;
>
> (2) Private lath house, greenhouse, or serivce yard;
>
> (3) Private tool shed or workshop;
>
> (4) Servants' quarters, provided that no kitchen or kitchen facilities shall be included in any such accessory building;
>
> (d) Libraries, museums, parks, playgrounds, public schools, and community buildings owned and controlled by the municipality or school district; water wells, and appurtenant facilities owned and operated by a public or quasi-public agency, if approved by resolution of record of both the Commission and City Council, and subject to such conditions as may be deemed proper by the City Council;

(e) Signs appurtenant to auxiliary uses permitted herein, providing they do not exceed three (3) square feet and are attached directly to the building;

(f) Signs advertising the premises for sale or for rent shall be located not nearer to the adjoining premises than ten (10) feet or nearer to the street line than five (5) feet, provided the sign shall not exceed five (5) square feet and provided there shall be not more than one sign on each ten (10) feet of frontage on a public street;

(g) A customary home occupation carried on in a dwelling, studio, or apartment, and carried on only by the members of the household of the person who occupies such dwelling, studio, or apartment, or his or her private residence, provided no window or other display or sign is used to advertise such occupation;

(h) The renting of not more than four (4) rooms to not more than eight (8) roomers and/or the providing of table board to not more than eight (8) boarders in a dwelling or apartment occupied as a private residence;

(i) Recreation and service buildings in a public park or public playground." [Tr. 63-64; App. 10-11]

Ordinance No. 441, amending Ordinance No. 409, by Sections 9.3 and 12.2 also provides for off-street parking on one-third of the lot used for assembly purposes. [Tr. 61-62; App. 8-9]

CONSTITUTIONAL PROVISIONS INVOKED

The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,

and to petition the Government for a redress of grievances."

Section one of the Fourteenth Amendment to the United States Constitution provides:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

I.

Whether the Ordinance and amendments thereto are void on their face because they scheme a classification that bears no reasonable relationship to the police power and they exclude from over 90 percent of the City of Azusa, which is not exclusively a residential city, all churches, limiting them to the industrial areas and undesirable places in the city, thus constituting a denial of freedom of worship and religion contrary to the First Amendment and the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

II.

Whether the Ordinance and the amendment thereto that allows other types of public and semipublic buildings in the area while prohibiting churches, which are public or semipublic buildings, schemes a discrimination between churches and such buildings so as to deny equal protection of the laws on the face of the Ordinance and as construed and applied contrary to the equal protection of the laws clause of the Fourteenth Amendment to the United States Constitution.

III.

Whether the denial of a permit when there were other churches that have been permitted by the City of Azusa in the R-1 zone, constitutes an enforcement of the Ordinance in a manner that discriminates unlawfully against the appellant and denies him his constitutional rights, making the Ordinance unconstitutional because, as construed and applied it is contrary to the equal protection clause of the Fourteenth Amendment and the First Amendment to the Constitution of the United States.

IV.

The Ordinance and amendments thereto, as construed and applied to the facts of this case by the denial of the variance, constitute a denial of freedom of religion, freedom of worship and freedom of assembly contrary to the First and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Nature of Action

This case involves an appeal from a final judgment dated April 22, 1957, denying appellant's petition for writ of mandate, certiorari, declaratory judgment and other relief prayed for, which was entered by the Superior Court of Los Angeles County. [Tr. 97-98] The appeal to the District Court of Appeal was taken on May 9, 1957, within 60 days from the date of said judgment. [Tr. 99] Appellant sought by his petition to compel the issuance of a conditional use permit (called a variance in the ordinance in question) to build a church in the City of Azusa, pursuant to the provisions of basic Ordinance No. 409 and amendments thereto, authorizing churches in the area. [Tr. 53-87; App. 1-30] In response to the second amended petition for writ of mandate and other relief the appellee demurred, which demurrer was sustained, denying all relief prayed

for. The District Court of Appeal on October 3, 1958, affirmed with an opinion. [Op. 1-29]

Summary of the Material Facts

Appellant is a resident of the City of Azusa, Los Angeles County, and is the presiding minister of the Azusa Congregation of Jehovah's Witnesses. [Tr. 53; App. 1] This congregation was formerly unincorporated but, after the property in question was acquired, it was incorporated. [Tr. 53; App. 1] The purposes of the congregation are to preach the gospel of God's Kingdom and morally and mentally improve men and women. The corporation is authorized to use all lawful means deemed expedient to carry out the religious purposes of the corporation. [Tr. 54; App. 2-3]

The congregation has jurisdiction over a portion of Los Angeles County, including the City of Azusa. [App. 1, 23-24] Located in such area are a large number of persons who are interested in the religious beliefs of Jehovah's Witnesses and who desire to attend their congregational meetings in a place of public worship. [App. 23-24] The congregation of Jehovah's Witnesses in the City of Azusa has outgrown its present meeting place, which is entirely inadequate and undesirable. Because of this compelling need for a new place of worship the congregation authorized appellant to purchase the real property in question as trustee for the congregation. [Tr. 54-55; App. 2, 23-24]

The property was purchased by deed on November 1, 1954, by appellant who has ever since held it as trustee for the congregation. [Tr. 54-55; App. 2] A legal description of the property appears in the record. [Tr. 55-56; App. 3]

The City of Azusa is a municipal corporation having zoning ordinances, a Planning Commission and a City Council. [Tr. 55; App. 2-3] All of the pertinent portions of the Ordinances and amendments thereto are set forth in the record. [Tr. 56-65; App. 4-11] The Ordinances were attached also to the original petition as an exhibit. [Tr. 17] They are incorporated into and made a part of the second

amended petition by reference [Tr. 80; App. 25] The basic Ordinance provides for a petition for a variance. [Tr. 56-57; App. 4] The conditions for the granting of a variance are set forth in Section 19.2 of Article XIX of Ordinance No. 409. [App. 4-5] To obtain a variance it is necessary to show special circumstances that do not apply to other property, that it is necessary to do substantial justice and avoid hardship and that it will not result in material damage or prejudice to other property in the vicinity or be detrimental to the public health, safety or welfare. [Tr. 57; App. 4-5]

Ever since the enactment of Ordinance No. 409 and the amendments thereto the City of Azusa has never in the administration of such zoning law restricted the R-1 zone to the uses specified in the ordinances above quoted and has never enforced the provision of the Ordinances confining churches to the R-3 zone and excluding them from the R-1 and R-2 zones. [Tr. 64-65; App. 10-12] At all times the City of Azusa has administered the law so as to permit churches in the R-1 zone by the granting of many variances. [Tr. 65; App. 11-12] Variances were granted on September 28, 1949, to the Concordia Lutheran Church; on August 31, 1950, to the First Christian Church; on May 10, 1951, to the Church of Christ; on August 29, 1951, to the Church of the Nazarene and on January 7, 1954, to the Emanuel Baptist Church. [Tr. 65-67; App. 12-13]

The variance granted to the Emanuel Baptist Church by the City of Azusa was on an R-1 lot located immediately to the south of appellant's lot and the circumstances surrounding the granting of such variance were identical to those in this case. [Tr. 65-66; App. 12] The variance granted to the Emanuel Baptist Church lapsed and was later not exercised by the church. [Tr. 75; App. 20-21]

Ordinance No. 409 excludes churches from the R-2 and M-2 zones, as well as the R-1 zone. [Tr. 77-78; App. 23-24] These zones from which churches have been excluded include over 90 percent of the entire area of the City of Azusa. [Tr. 77-78; App. 23-24] The only available property for

churches in these zones is located adjacent to industrial uses and otherwise undesirable places for churches. [Tr. 77-78; App. 23] The practical effect of the ordinances as written excludes churches from over 95 percent of the suitable areas of the City of Azusa for building of churches. [Tr. 77-78; App. 23-24]

The ordinances as administered, however, have not been enforced so as to exclude churches from the R-1, R-2 and M-2 zones but on the contrary the variance provisions of the ordinances have been administered by the City of Azusa so as to use the same as special use permits for churches in the R-1 zone and other zones. [Tr. 65; App. 11-12]

Appellant during August of 1954 filed a written application using the printed forms of the Planning Commission of the City of Azusa for a variance. This application "complied in every respect with the law as then written and administered." [Tr. 67; App. 14] Notice was given and investigation was made. Thereafter on August 11, 1954, a hearing was had. [Tr. 68; App. 14] A copy of the transcript of the hearing before the Planning Commission on August 11, 1954, is attached to the second amended petition. [Tr. 69; App. 15, 31] The Planning Commission recommended against the granting of the variance, as appears in said transcript. [Tr. 69; App. 15] The matter came on for hearing before the City Council on September 7, 1954. The City Council affirmed the denial of the special use permit or variance and accepted the recommendation of the Planning Commission. [Tr. 69-70; App. 15-16] The reason for the affirmance was due "to the number of protests filed with the Council by people in the immediate vicinity." [Tr. 70; App. 16]

The application was renewed with the City Council. It was supported by a lengthy written document prepared by appellant as a verified supplement to the first application. This document is Exhibit C to the appellant's first amended petition, which is incorporated by reference in the second amended petition. [Tr. 70-71; App. 17, 52-82] The supple-

mental application was heard by the Planning Commission on February 2, 1955. [Tr. 71; App. 17] The transcript of that hearing is attached to the second amended petition as Exhibit B. [Tr. 71: App. 17, 35-47]

The Planning Commission on February 16, 1955, recommended against the granting of the application. A copy of that recommendation to the City Council is set forth as Exhibit C to appellant's second amended petition. [Tr. 71; App. 17, 47-49]

The City Council five days later, on February 21, 1955, sustained the action of the Planning Commission and accepted the recommendation that appellant be denied the permit to build the church and the variance. The minutes of the City Council's action are set forth in the record. [Tr. 73-74; App. 19-20]

The undisputed evidence appearing in (1) the written application for variance, (2) the verified supplement, (3) the transcript of the hearing of August 11, 1954, before the Planning Commission and (4) the transcript of the hearing before the City Council on February 2, 1955, showed that appellant was entitled as a matter of law to the granting of the permit to build a church or the variance. [Tr. 71, 72, 87; App. 49-52, 52-89, 31-35, 35-47]

The facts established that appellant was the owner of the property and trustee for the congregation, as well as the presiding minister. [App. 52-53] It was shown that the property was desired to be used as a church meeting place. The record showed a beautifully planned building conforming to the ordinances in all respects as to location, size, backset and off-street parking. [App. 53, 60-64] The proof showed that the appellant and the congregation represented by him were fully able to finance the building. [App. 60-64] The meetings of the church were shown to be orderly and not noisy and would not interfere with the use of other property in the area. [App. 67-68, 70, 82-87] It was made to appear that the building would be equal to or higher in standard in comparison with other buildings in the commu-

nity, with very pleasing architecture. [App. 72-73] It was shown that there would be no congestion of traffic and that there would be few cars. [App. 73-74] Appellant produced pictures of the entire neighborhood and of the site where the building was proposed. [App. 79]

The objections of the neighbors were answered by the appellant before the Planning Commission. [App. 61-64, 73, 74-76] The record before the Planning Commission also showed the granting of permits to other churches in the R-1 zone under circumstances identical to those surrounding the application on the property of the appellant. [App. 70-71, 71-72, 73, 77, 78] It was stated to the Planning Commission that the granting of permits to other churches and denying the permit to the appellant constituted a denial of equal protection of the laws and was also arbitrary and capricious. [App. 70, 70-71, 71-72, 73] The evidence also showed that the congregation represented by appellant would be irreparably injured and harmed if it were not permitted to build a church in the R-1 zone as other churches had been allowed to do. [App. 67]

It was alleged that the action of the Planning Commission and the City Council of the City of Azusa was arbitrary and capricious and based upon prejudice and objections of neighbors and there was no evidence of any kind of injury to the neighborhood, all of which resulted in a denial of constitutional rights. [Tr. 76-77; App. 21-23] It was further alleged that the ordinance on its face was unreasonable in that it excluded churches from 95 percent of the suitable places in the City of Azusa and limited them to places adjacent to industries and the railroads. [Tr. 76-78; App. 21-24] It was further alleged that the denial of the permit or variance constituted a denial of a place of religious assembly to the congregation represented by appellant in the City of Azusa which would constitute a denial of freedom of worship, religion and assembly to the entire congregation contrary to the constitution. [Tr. 78; App. 23]

How Federal Questions Raised and Determined

In the second amended petition for writ of mandate that requested other relief the appellant alleged specifically in paragraphs XXVII to XXVIII that the original Ordinance and the amended Ordinance, in the sections here complained about, both on their face and as construed and applied were discriminatory and in violation of the First and Fourteenth Amendments to the Constitution of the United States and in each of those paragraphs specified each of the questions presented upon this appeal and as stated above. [Tr. 76-80, 84-85; App. 22-26, 27-28] The trial court dismissed the petition upon a demurrer. [Tr. 97]

Each question under the federal Constitution presented upon this appeal was duly presented to the District Court of Appeal and each such question was considered and passed upon by that court adversely to the appellant. [Tr. 112-156; Op. 1-29] In a petition for hearing presented to the Supreme Court of California in the time required by law the appellant specifically presented to that court each of the above stated questions. [Tr. 157-202] That court on consideration of each of said federal questions denied a hearing in that court. [Tr. 242]

It is plain that each federal question here presented, therefore, was properly and timely raised and passed upon by the trial court, by the District Court of Appeal and by the Supreme Court of California. This Court must consequently find that each question presented is properly involved and requires decision by this Court.

ALL QUESTIONS RAISED ARE SUBSTANTIAL

I.

Exclusion of Churches While Allowing Other Public Buildings

The holding of the District Court of Appeal that there was no discrimination between the classification, excluding

churches and allowing other public buildings, in the Ordinance presents a conflict of decision with *Niemotko* v. *Maryland,* 340 U. S. 268 (1951); *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886) and *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942). This conflict shows a substantial question so as to make necessary a hearing in this Court by noting jurisdiction in order to secure uniformity of decision.

Ordinance No. 409, as amended by Ordinance No. 455, does not create an exclusively residential zone. It merely limits uses permitted in the residential zones to one and two family dwellings, agricultural uses and public buildings, such as libraries, museums, parks, playgrounds, public schools and community buildings. Churches and parochial schools which are also public buildings are prohibited in the zones but are restricted to the R-3 or multiple family zone and the R-4 or apartment house zone which constitute less than ten percent of the City of Azusa. [Op. 2]

Churches are public or semipublic buildings. They are schools where religious instruction is given. While different from public or parochial schools, the difference is not substantial. The distinction is not sufficient to avoid unconstitutional discrimination in the ordinance. Churches, as places of public education in the field of religion, contribute to the public welfare and bear burdens that normally fall upon the government. The peculiar public nature of sectarian places of public worship has resulted in a state constitutional tax exemption. The tax exemption of such public places of public education in religion is justified on the ground that they are "a sure basis on which the fabric of civil society can rest, and without which it could not endure."—*Trustees of First M. E. Church South* v. *Atlanta,* 76 Ga. 181, 192 (1886).

The performance of public functions that normally fall on the government proves the close similarity with public buildings, schools and other community buildings. The similarity of churches to other public buildings is so close

that the distinction made by the court below is a distinction without a difference. The holding of the court below that the Ordinance did not discriminate by excluding churches from the various zones of Azusa is out of harmony with *Roman Cath. etc. Corp.* v. *City of Piedmont,* 45 Cal. 2d 325, 289 P. 2d 438 (1955).

The holding of the court below is based upon the assumption that, so long as churches are all excluded by the face of the Ordinance and thus all are treated alike by the Ordinance on its face, there has been no unconstitutional discrimination. The court below bases its entire approach upon the erroneous assumption that *Corporation of Presiding Bishop* v. *City of Porterville,* 90 Cal. App. 2d 656, 203 P. 2d 823 (1949), applies. The ordinance involved in that case created a strictly residential district. No public uses of any sort were permitted in the limited and restricted area of the city. The Ordinance did not create an exclusively residential area in this case.

The Ordinance involved here permits a multitude of other public uses. The entire basis of *Corporation of Presiding Bishop* v. *City of Porterville,* 90 Cal. App. 2d 656, 203 P. 2d 823 (1949), was that it was within the police power to restrict uses in a *limited* area of a city so that "peace and quiet" could be preserved in that area of the city. But the Ordinance here involved does not even purport to preserve "peace and quiet" of the residential areas. Public buildings and schools are permitted which attract large crowds resulting in a permissive destruction of "peace and quiet" in all residential areas of Azusa. There is located directly across the street from the property involved here a public school with a school playground and game field that attracts huge crowds, to the disquiet of the entire area.

It is submitted that the classification of one type of public building so as to permit it and exclude another public building that does not disturb the "peace and quiet" of the neighborhood any more than the one allowed, is a distinction without a difference in law. It is not a classification

that is based "upon some difference in the classes having a substantial relation to the purpose for which the legislation is designed" which in a zoning ordinance must be the "peace and quiet" of the neighborhood. Because of this obvious difference there is no similarity between this case and *Corporation of Presiding Bishop* v. *City of Porterville,* 90 Cal. App. 2d 656, 203 P. 2d 823 (1949), which was erroneously simulated to this case by the court below.

In the event that the Court does not find that any conflict exists between the decision of the court below and the other cases cited above, then it is submitted that jurisdiction should be noted because the question involved is of such great and wide public importance that it is necessary to settle the question by a decision of this Court.

II.

Exclusion of the Churches From Over Ninety Per Cent of City

There is also involved in this case another question of very great public importance that justifies this Court in noting jurisdiction. It is whether the Ordinance in question is unreasonable and void on its face because it schemed a discriminatory classification against churches through excluding them from the zones that are not exclusively residential constituting over 90 percent of the entire area of the City of Azusa. The Ordinance limits churches, according to its provisions and the zoning map made a part of the Ordinance, to apartment house zones, industrial areas and other undesirable places in the city. This legislative action of the City of Azusa constitutes a denial of freedom of worship and religion contrary to the First and Fourteenth Amendments to the United States Constitution.

The court below refused to indulge reasonable intendments in favor of the pleading demurred to by the City of Azusa. It also completely disregarded Section 3.2 of Ordinance No. 455 and the zoning map attached to and made a

part of the pleading. Both of these documents, attached to the petition demurred to, show on their face without contradiction that the zones from which churches are excluded in the City of Azusa constitute over 90 percent or approximately 95 percent of the entire area of the city.

The court below stated that the incorporated references are "the zoning ordinance and the map" and then added, contrary to such documents, "but they do not show the truth of the asserted facts." [Op. 14] In the concluding part of the opinion this statement defying the documentary evidence attached to the petition demurred to is made again. The court below said: "The ordinance and zoning map do not support the allegation—not without the aid of oral explanation and application to the city's entire area." [Op. 26] These erroneous holdings of the court below are based upon the illegal conclusion that it was necessary that the appellant raise this objection to the ordinance at the hearings by oral testimony explaining to the Planning Commission and the City Council that the Ordinance and zoning map zoned churches out of over 90 percent of the city.

The law did not require appellant to give oral testimony at the hearings before the Planning Commission and the City Council to prove what the City Council could take judicial notice of, which was that churches are excluded from over 90 percent of the city by the Ordinance itself and the zoning map accompanying the Ordinance. These were made a part of the record of the hearings before the Planning Commission and the City Council. They established the fact of the exclusion *per se*. They were attached to and made part of the petition demurred to. It was wholly unnecessary to have oral testimony explaining or interpreting them to show the Council that the area from which churches are excluded constitutes over 90 percent of the area of the entire city. The two documents that were before the Council and which were attached to the petition were enough. They needed no support of oral testimony to the

Council, as held by the court below. The documents spoke for themselves.

It was not necessary to even offer them at the hearings before the Planning Commission or the City Council. These adminstrative bodies could take judicial notice of the zoning law that they were acting under, as well as the map made a part of the law by reference. It was time enough to rely upon these documents to prove the exclusion when they were attached to the petition demurred to.

It is submitted that the District Court of Appeal ignored the fact that in the declaratory judgment action it was unnecessary to show that the documents were challenged before the Council. The court below should have held that the pleadings and the record attached to the pleadings did in the declaratory judgment action sufficiently show that the ordinance, on its face and by reference to the zoning map, excluded churches from over 90 percent of the City of Azusa. This holding of the court below, that the record does not show an exclusion of churches from over 90 percent of the city, should not preclude this Court from considering this all-important question. The holding of the court below is in conflict with other decisions, holding that this Court deals with substance and not shadows and will cut through technicalities and examine the facts for itself in spite of a state court holding to the contrary. See *Fiske* v. *Kansas,* 274 U. S. 380, 385-386; *Norris* v. *Alabama,* 294 U. S. 587, 590; *Chambers* v. *Florida,* 209 U. S. 227, 228-229; *Ashcroft* v. *Tennessee,* 322 U. S. 143, 147-148 and *Craig* v. *Harvey,* 331 U. S. 367, 373-374.

The decision of the District Court of Appeal does not involve an inquiry "into the correctness of the facts stated in the opinion" as that term is used in Rule 29 (b) of the Rules of Appeal of California. The District Court of Appeal correctly stated the facts of existence of the Ordinance and the map attached to the petition demurred to. The error of the court below is an error of law based upon the erroneous assumption that the failure to have oral testimony at the

hearing before the City Council about the matter justified a conclusion that appellant failed to show in his pleadings that the Ordinance and the map exclude churches from over 90 percent of the area of the City of Azusa, when the Ordinance (Section 3. 2 of Ordinance No. 455) and the map on their face showed the exclusion to the extent of 95 percent of the City.

Neither this Court nor any court other than the court below has determined that the exclusion of churches from over 90 percent of the area of a city is not a denial of rights guaranteed by federal constitutions. The Supreme Court of Michigan has, however, decided that an ordinance excluding churches from even the greater part of a city does constitute a violation of constitutional rights of a church. See *Mooney* v. *Village of Orchard Lake*, 333 Mich. 389, 53 N. W. 2d 308, 309-310 (1952), where "although" *the ordinance appeared on its face* to allow churches and schools, under special permit only, in three zones comprising about *ten per cent* of the village's area while prohibiting them in the fourth zone containing the balance of the village, nevertheless, when applied to existing facts and circumstances, it served, as a practical matter, to exclude churches and schools from the village." (Italics added.) See *Congregation Temple Israel* v. *City of Creve Coeur*, 320 S. W. 2d 451, 454-45 (S. Ct. Mo., January 12, 1959, No. 46,597), where the court cites 14 high state court decisions holding "invalid zoning ordinances which have excluded churches or religious schools from residential districts."

It is submitted that this question is so substantial and of such wide public importance that this Court should note jurisdiction in order to determine it.

III.

Ordinance Grants Unlimited Discretion to City Council

There exists in this case another question that is of wide importance which requires the noting of jurisdiction for a

hearing in this case. It is whether the Ordinance in question granting unlimited and uncontrolled discretion in the City Council to deny the variance made the Ordinance unconstitutional because, as construed and applied to the facts of this case, it denied appellant of freedom of assembly and freedom of worship, contrary to the Constitution of California and the First and Fourteenth Amendments to the United States Constitution. See *Lovell* v. *City of Griffen*, 303 U. S. 444 (1938); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Saia* v. *New York*, 334 U. S. 558 (1948). The decision of the court below was that it did not. [Op. 27-28] This holding is in conflict with these decisions by the Supreme Court of the United States and for that reason also it is necessary for this Court to note jurisdiction and order a hearing in order to secure uniformity of decisions.

IV.

Discrimination Between Appellant and Other Religions

There exists in this case another question that provides reason why there should be a noting of jurisdiction and hearing in this Court. It is whether the action of the City Council of Azusa in granting five other variances to religious organizations under the Ordinance permitting them to build churches in the R-1 zone after the passing of the Ordinance, while denying the application of the appellant in the same circumstances, constitutes a denial of freedom of assembly and worship, contrary to the provisions of the state and federal constitutions guaranteeing equal protection of the laws. The court found that the action of the City Council did not constitute discrimination but was a fair and lawful administration of the zoning law. [Op. 19-21, 25-26] The decision of the court below is in conflict with *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942); *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953; *Danskin* v. *San Diego Unified School*

District, 28 Cal. 2d 536, 545, 171 P. 2d 885 (1946); *Underhill v. Board of Appeals of Town of Oyster Bay*, 273 App. Div. 788, 75 N. Y. Supp. 2d 327, 328 (1947) (affirmed, 297 N. Y. 937, 80 N. E. 2d 342).

This Court ought to note jurisdiction because of the substantial question involved as to the means employed by the court below in its opinion to reach a conclusion that no case of discrimination was shown by appellant. It was that because the Council had made five previous mistakes in granting church variances favoring other churches it gave no justification for the granting of the sixth variance to appellant contrary to law. The court below ignored that appellant challenged the entire legislative scheme of providing for variance as the means of having churches in the residential zones wrapped up in the subsequent administration of the variance provisions so as to convert the law into a conditional use permit for churches instead. It should be noted that all five of the other churches permitted by the Council were granted under the variance provisions of the Ordinance and, of the five the Council granted, three were in the R-1 residential district. The other two churches were allowed in other residential districts where churches were also prohibited except by variances.

The court below glossed over the undisputed evidence showing a discrimination in the administration of the variance provisions of the Ordinance insofar as they related to churches. The court below blandly held that there existed a presumption of regularity of administrative procedure by the council in the administration of the variance provisions. This holding ignored the fact that under the law of the land there exists a difference between cases involving freedom of religion and cases involving mere property rights without reference to civil rights. Where civil rights are involved in any case then there is no presumption of regularity of administrative proceedings and the burden shifts to the administrative agency to justify the deprivation of the fundamental personal rights of freedom of as-

sembly and religion. (*In re Porterfield*, 28 Cal. 2d 91, 112, 168 P. 2d 706 (1946); *Roman Cath. etc. Corp.* v. *City of Piedmont*, 45 Cal. 2d 325, 289 P. 2d 438 (1955); *Pittsford* v. *City of Los Angeles*, 50 Cal. App. 2d 25, 32 122 P. 2d 535 (1942); *In re Mares*, 75 Cal. App. 2d 798, 806, 171 P. 2d 762 (1946); see also *State ex rel. Synod of Ohio* v. *Joseph*, 139 Ohio St. 229, 246-247, 39 N. E. 2d 515 (1942); *Thomas* v. *Collins*, 323 U. S. 516, 531 (1945); *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 (1938); *Busey* v. *District of Columbia*, 138 F. 2d 592,595-596 (D. C. Cir. 1943); 3 U. C. L. A. Law Review 387, 389, 390.) The appellee in this case failed to meet the burden cast upon it by the cases above cited.

The court below allowed the erroneous application by it of the rule of presumption of regularity of administrative proceedings to blind it to the facts appearing in the record showing a disgraceful discrimination practiced by the City of Azusa against Jehovah's Witnesses. It showed they allowed all other churches to have permits to build in the residential areas issued to them by way of the variance law and at the same time denied appellant a permit to build a church in the same zoned areas.

It is submitted that because of the conflict between the holding of the court below and the decisions above cited it is necessary for this Court to note jurisdiction so as to secure uniformity of decision on this important question of law. In the event the Court finds no conflict, then the Court is respectfully requested to note jurisdiction because there is involved a substantial question of constitutional law of nation wide public importance.

V.

Court Erred In Resting Decision on Presumption of Constitutionality of Ordinance and City Council Action

There exists another reason why this Court should note jurisdiction. The decision of the court below, that there

existed no presumption of unconstitutionality of the administrative action in denying the application made by the appellant and in holding that the appellant had the burden of proof to satisfy all of the demands of the City Council in order to obtain a variance by showing an abuse of discretion, undue hardship and special circumstances, is in conflict with *In re Porterfield*, 28 Cal. 2d 91, 112, 168 P. 706 (1946); *Roman Cath. etc. Corp.* v. *City of Piedmont*, 45 Cal. 2d 325, 333, 289 P. 2d 438 (1955); *Busey* v. *District of Columbia*, 138 F. 2d 592, 595-596 (D.C. Cir. 1943); *Thomas* v. *Collins*, 323 U. S. 516, 531 (1945); *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 (1938); *State ex rel. Synod of Ohio* v. *Joseph*, 139 Ohio St. 229, 246-247, 39 N. E. 2d 515 (1942). See also 3 U. C. L. A. Law Rev. 387, 389, 390.

It is respectfully submitted that the holding of the court below on these issues conflicts with the decisions above cited. This constitutes a ground for noting jurisdiction by this Court since it is necessary to secure uniformity of decisions.

VI.

Reasons of City Council Insufficient to Deny Right Guaranteed by First Amendment

The holding of the court below approving the findings of the City Council, that the application should be denied because of reasons of traffic congestion, noise, depreciation of property values and other such reasons, is a holding that relies upon unsubstantial and insufficient reasons of police power that are inadequate to support a denial of rights guaranteed by the First Amendment to the Constitution of the United States. The decision of the court below ignores the distinction between cases involving rights of freedom of assembly and freedom of worship guaranteed by the First and Fourteenth Amendments to the United States Constitution and mere property rights guaranteed by the Fourteenth Amendment. The holding of the court

below on this point is in conflict with *Terminiello* v. *City of Chicago*, 337 U. S. 1, 4 (1949); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943); *Schneider* v. *New Jersey*, 308 U. S. 147, 161 (1939); *Thomas* v. *Collins*, 323 U. S. 516, 529-530 (1945); *Thornhill* v. *Alabama*, 310 U. S. 88, 95-96 (1940); *Martin* v. *City of Struthers*, 319 U. S. 141, 151-152 (1943); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115 (1943); *Follett* v. *Town of McCormick*, 321 U. S. 573, 575 (1944); *Pittsford* v. *City of Los Angeles* 50 Cal. App. 2d 25, 32, 122 P. 2d 535 (1942); *In re Mares*, 75 Cal. App. 2d 798, 806, 171 P. 2d 762 (1946).

It may be argued that this case does not involve rights of religion and assembly guaranteed by the constitutions. The court below seemed to think that the case involved only property rights and that appellant stood on no higher estate. But the assumption of the court below ignores the following fundamentals: there can be no worship without assembly; there can be no assembly for worship without a place; there can be no place of assembly unless it can be used for assembly for public worship. The Constitution, therefore, guarantees a right to own and use real estate for a place of worship. If the place of assembly is denied under the pretext of regulation by a zoning law that confers arbitrary and capricious powers to deny the right to use a place of assembly guaranteed by the Constitution then there is a denial of freedom of worship.

There can be no distinction between worship in the conventional manner in a place of assembly and worship by means of distribution of religious literature. The cases of *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938); *Schneider* v. *New Jersey*, 308 U. S. 147, 161-162, 163 (1939); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Largent* v. *Texas*, 318 U. S. 418 (1943); and *Saia* v. *New York*, 334 U. S. 558 (1948), are, therefore, applicable here. The decision of the court below is in conflict with such decisions, as also it is with the decisions cited above under this point holding that insubstantial reasons justifying laws abridging the rights

of property are not sufficient to support a denial of civil liberties.

It is respectfully submitted that the holding of the court below on this issue conflicts with the decisions above cited. This constitutes a ground for noting jurisdiction by this Court since it is necessary to secure uniformity of decision.

The case of *Corporation of Presiding Bishop* v. *City of Porterville*, 90 Cal. App 2d 656, 203 P. 2d 823 (1949), appeal dismissed 338 U. S. 805 (1949), commented upon in *American Communications Association* v. *Douds*, 339 U. S. 382, 397-398 (1950), relied on by the court below, is not in point. [Tr. 117-118, 209-210; Op. 5] The case did not involved a residential district where many other public uses and other nonresidential uses were allowed, as here, but part of the Ordinance was limited only to a small portion of the city. It prohibited churches in only one small residential area of the city which was confined exclusively to single-family dwellings and no public and non-residential use was allowed, as in this case. The case here where churches are excluded from 95 per cent of the city is more like *Mooney* v. *Village of Orchard Lake*, 333 Mich. 389, 53 N. W. 2d 308 (1952). Compare *Roman Catholic Welfare Corp.* v. *City of Piedmont*, 45 Cal. 2d 325, 289 P. 2d 438 (1955). See also 70 Harv. L. Rev. 1428; 44 Cal. L. Rev. 775, 777; 3 U. C. L. A. L. Rev. 387, 391; 27 St. Johns L. Rev. 93; 55 Mich. L. Rev. 601, 602; 23 Brooklyn L. Rev. 185; 53 W. Va. L. Rev. 301; and 3 St. Louis U. L. Jour. 265.

The court below quotes from *American Communications Association* v. *Douds*, 339 U. S. 382, 397-398 (1950), where the Court cites *Corporation of Presiding Bishop* v. *City of Porterville*, 90 Cal. App. 2d 656, 203 P. 2d 823 (1949). [Tr. 117-118, 209-210; Op. 5] There the Court said that the Ordinance that carved out a very small part of the city and made it exclusively residential (without any public uses) was a "relatively small" infringement upon freedom of religion. Here the entire R-1 residential zone is not exclusively residential but is a zone where churches are permitted

along with other public uses. Appellant has been barred from this "appropriate place" for churches (*Schneider* v. *New Jersey*, 308 U. S. 147, 167) by the enforcement of the vague and indefinite provisions of the various sections of the Ordinance which applies to 95 per cent of the city. Such provisions relied upon by the City Council to bar the appellant from having a church in the R-1 zone cannot, by any stretch of the imagination, be said to be "relatively small" or simulated to the small exclusively residential part of the City of Porterville, California.

The statement by this Court in *American Communications Association* v. *Douds*, 339 U. S. 382, 397-398 (1950), about the dismissal for want of substantial question in *Corporation of Presiding Bishop* v. *City of Porterville*, 90 Cal. App 2d 656, 203 P. 2d 823 (1949) appeal dismissed 338 U. S. 805 (1949), is not applicable in this case for the reason that it is distinguishable as stated above.

CONCLUSION

For the reasons above stated this Court should conclude that the questions involved are substantial and of wide public importance so as to warrant the noting of jurisdiction, which should be done by this Court. Then the case should be set down for hearing and the questions resolved in due course of time and procedure.

Respectfully submitted,

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March, 1959

APPENDIX A

Judgment of District Court of Appeal

Judgment affirmed.

J. ASHBURN

We concur.

P. J. FOX

J. HERNDON

[Tr. 156]

APPENDIX B

Order Denying Hearing After Judgment by District Court of Appeal

Order Due
December 2, 1958

2nd District, Division 2, Civ. N. 22896

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

MINNEY
v.
CITY OF AZUSA

Appellant's petition for hearing DENIED.

Carter, J.
and
Traynor, J. are of the opinion that the petition should be granted.

GIBSON
Chief Justice

FILED
DEC 1, 1958

[Tr. 242]